is liable for the acts of his servants while employed in his business. *Scott v. The City of New York,* 50 N. Y. Supp., 191. The commissioner of street cleaning of the City of New York is an agent of the city, and not an officer of the general public, notwithstanding his duties are partly rendered in the interests of the public health, and his powers are plenary, and within their sphere, exclusive of the authority of an officer of the city. The city is, therefore, liable for his negligent acts done in the course of his official duty. *Barney Dumping-Boat Co. et al. v. Major, etc., and The City of New York,* 40 Fed., 50.

It seems from the authorities examined, that they divide themselves territorially. The New England states hold that the duties of supervising the streets of a municipality are of the class denominated public, and therefore the municipality is not liable for damages resulting in the negligent or wrongful performance of such duties by its officers or agents. As such, they are agents of the public at large, exercising their duties under governmental powers, on behalf of the state in general. But in other jurisdictions, the great weight of authority seems to be that such duties are part of the duties of municipalities, exercised for the benefit of the compact community and of the municipalities themselves. Therefore cities are liable for any damages resulting from the negligent performance of duties of this nature, by their agents and officers. Thus the weight of authority seems to be with the principal case, although there are some conspicuous authorities which have taken a decided stand against it, and the bulwark of which is unshakable.

THE STATUS OF A STREET RAILWAY IN THE CITY STREETS.

In the *New York Cent. & H. R. R. Co. v. City of New York et al.,* 127 N. Y. Supp., 513, the Hudson River R. R. Co. which had been organized since 1846 for a term of fifty years obtained from the State of New York the right to lay tracks in certain streets in New York City. This company was afterwards consolidated and became a part of the New York Central lines, under a law that provided that the franchises of each corporation should be vested in the new company. The city ordered the tracks of the plaintiff to be removed at the expiration of the fifty-year term because they had become a nuisance. The court enjoined the

execution of the order on the ground that the State alone had the power to question the exercise of the franchise, and that the franchises were not limited to the terms of years granted to each corporation, but to length of time which had been granted to the consolidation of the corporations which was five hundred years, and hence all periods of franchises were lengthened to this time.

According to different rulings, the right of way granted to a railway in city streets have been described as franchises, easements, licenses and contracts. *In re Thirty-fourth St. R. R. Co.,* 102 N. Y., 343, held that a franchise is a privilege conferred by grant from the government or a sovereign power and is vested in individuals or corporations.

According to *B. & N. R. R. Co. v. Town of Alston,* 54 W. Va., 597, a permit to a railway from a city council for occupation is not a franchise, but an easement, and the council by voting such a permit, gives a license or grant thereof. Another view of a right of way is spoken of in *Mayor of Troy v. Troy and Lansingburgh R. Co.,* 49 N. Y., 657, which held that a permit by a municipal corporation to a railroad is a license granted upon certain terms which becomes a contract between the parties. *The City of Binghampton v. B. P. & D. Ry. Co.,* 61 Hun., 479, brings out the idea of a right of way being a contract in the following manner. In this case, the plaintiff brought an action against the defendant to recover the expense of paving between its tracks. It appeared that there was inserted in the defendant's franchise a condition that they should keep the highways within the rails and one foot outside thereof in good repair. The city paved the street and now seeks to recover damages for non-fulfillment on part of the defendant. Here it seems that a right of way granted to a railway company to lay tracks in its streets is regarded as a contract.

The inability to draw a line of distinction between a right of way and a license seems to have presented itself in *Union Traction Co. v. City of Chicago,* 199 Ill., 484, which held that by a City and Village Act empowering cities and villages to license, tax and regulate hackmen, draymen, etc., and all others pursuing a like occupation and provide them compensation, that they might also treat an ordinary street use as a license, and thus the two were united together and within the power of the municipality.

In regard to a right of way being an easement, the theory for this point is found in *Milhau v. Sharp,* 27 N. Y., 611, which held that as a resolution passed by a common council authorizing private persons—that is being for their benefit—the right to operate a railway, if it is without limitation as to time or reserving power of revocation is not a license, and if valid is a contract, which cannot be abrogated.

There is a difference, however, between a right of way, from either a license, easement or contract.

The first point of difference may be noted in *People ex rel. Emsfield v. Murray,* 149 N. Y., 367, which held in considering a question on liquor traffic that a license was not taxable as property, while the street rights of a railway are taxable according to *People ex rel. Met. St. R. Co. v. Tax Commissioners,* 174 N. Y., 417, a franchise, by an amendment to the general tax law is for purpose of taxation considered to be real estate, and also tangible property such as rails and rolling stock is taxable.

As between an easement in gross and street rights of a railway, the former according to *Minor & Wurts on Real Property,* page 82, Sec. 86, is not assignable by the weight of authority, while the rights of a street railway are assignable according to *Parker v. Elmira Co. & N. R. R. Co.,* 165 N. Y., 274, which held that a right of way granted to railway is a privilege or franchise, and in nature of property is alienable and transferable and can be assigned. Between a license and a franchise, a line of distinction may be drawn, for by a license one might do an act which could not be lawfully done otherwise without the grant of the State, but a franchise carries with it an interest of the public according to *Pierce v. Emery,* 32 N. H., 484, which held that land taken by authority of the State for a public use and conveyed by a charter to a corporation, the corporation holds it in trust for the public, in which they have a continual easement. The remaining line of distinction to be drawn is between a franchise and a contract; the former being according to *Queen v. Cambrian Ry. Co.,* L. R. 6 Qu. B., 422, an incorporeal hereditament while the latter is always a chose in action.

The better theory it seems would be to consider the right of a street railway in a street a franchise, which according to *Blair*

v. City of Chicago, 211 U. S., 400, must be shown to have been conferred in plain terms, and nothing passes by a grant of a franchise except as is clearly stated or necessarily implied, and any ambiguity in its terms is to be construed strictly in favor of the grantor and against the grantee.

The City of New York no doubt thought that it was well within its power when it attempted to remove the rails of the street railway company, because they were a nuisance in *N. Y. C. & H. R.R. Co. v. The City of New York,* 127 N. Y. Supp., 517, for the ruling in *Hume v. Mayor of New York,* 74 N. Y., 264, encroachments made against private persons and unauthorized are to be considered as nuisances and it is the duty of the city to remove them and in *The Easton and Amboy R. R. Co. v. Inhabitants of Greenwich,* 25 N. J. E., 565, a similar ruling is noticed, for in this case it was held, that it is within the power and duty of city and town officials to look out for the good of the town, and they may maintain an action for the people and the people through them.

Without a doubt the City of New York over-stepped the limits of its power, because the law of 1869 vested the legislature with the power to determine the duration of the grants and privileges of the consolidated company, which were measured by its life. This case, however, affords the opportunity for one to consider the different theories advanced to determine the status of a street railway in the city streets.